Supreme Court, U.S.
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No. 97-908

In The

Supreme Court of the United States

October Term, 1997

NORMAN H. LEATH,

Petitioner,

vs.

AMERICAN MEDICAL INTERNATIONAL, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an arbitration agreement between an employer and an at-will employee which encompasses statutory claims, like Title VII and Section 1981, unenforceable because it constitutes a waiver of the employee's substantive rights under those statutes?

STATEMENT PURSUANT TO RULE 29.6

American Medical International, Inc.'s name was changed on November 21, 1995 to Tenet HealthSystem Medical, Inc. Tenet HealthSystem Medical, Inc. is owned by Tenet HealthSystems Holding, Inc. The parent corporation of Tenet HealthSystems Holding, Inc. is Tenet Healthcare Corporation. Respondent has no nonwholly owned subsidiaries.

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is accurately set forth in Appendix A to the Petition for Writ of Certiorari ("Petition"). The opinion and judgment of the district court are accurately set forth in Appendices B and C of the Petition.[1]

STATUTE INVOLVED

The Federal Arbitration Act ("FAA") is applicable as follows:

> [A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

CONCISE STATEMENT OF THE CASE

A. Statement of Facts

On March 22, 1993, Petitioner, Norman Leath ("Leath") signed a form on which he agreed to arbitrate any disputes arising out of his employment or the termination of his employment. (R. at 21).[2] Specifically, the agreement contained the following language:

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1. References to the Appendices of the Petition are abbreviated "App. __."

2. References to the district court record are abbreviated "R. at __."

> I understand AMI makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the **final decision** of the arbitration panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.

(R. at 21). In March 1993, American Medical International, Inc. ("AMI") notified Leath that because of the company's reorganization, AMI was eliminating his position. (R. at 79-80). Leath was officially discharged on August 29, 1993. (R. at 6).

B. Course of Proceedings Below

Despite his agreement to arbitrate all claims, Leath filed a lawsuit in which he alleged statutory claims related to the termination of his employment under 42 U.S.C. § 2000e *et seq.* ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). (R. at 1). AMI answered, asserting that Leath's claims were subject to the parties' prior agreement to arbitrate all claims related to his employment or the termination of his employment. (R. at 13). Pursuant to the parties' agreed motion, the district court stayed proceedings pending arbitration. (R. at 18-22). The parties jointly selected an Arbitrator who concluded that Leath's claims were time-barred and that Leath failed to present evidence that AMI had discriminated against him. (R. at 27). Therefore, the Arbitrator denied Leath's claims in their entirety. (R. at 28). AMI moved to confirm this award. (R. at 24-26). Leath opposed this confirmation, arguing that the arbitration agreement was unenforceable. (R. at 32-47). AMI filed a Reply to this Response. (R. at 48-82). The district court was not persuaded by Leath's arguments and, consequently, confirmed the arbitration award and dismissed

Leath's claims with prejudice. (R. at 83-85). The district court held that Leath had "presented no evidence that would support a prima facie case of fraudulent inducement, of the absence of voluntary consent, or of any other fact-based challenge that he makes to the award." (App. B).

Leath appealed to the Fifth Circuit. (R. at 86). The Fifth Circuit upheld the district court in a brief opinion which it deemed not worthy of publication because of its limited precedential value. (App. A). The Fifth Circuit held that the district court had appropriately applied the analysis outlined by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and that Leath's arguments to the contrary lacked merit. (App. A).

REASONS FOR DENYING THE WRIT

I.

NO COMPELLING REASONS EXIST FOR GRANTING LEATH'S PETITION.

There are no "compelling" reasons for reviewing the Fifth Circuit's opinion in this case. SUP. CT. R. 10. The district court's decision enforcing the arbitration agreement between Leath and AMI and the Fifth Circuit's opinion upholding that decision are clear applications of well settled law. *See Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991). Leath can not, and does not, present any law or persuasive argument to counter this conclusion. Rather, Leath argues that because arbitration of statutory claims constitutes a waiver of substantive rights, the Court could not have intended for *Gilmer* to support the application of Texas state contract law to arbitration agreements encompassing potential statutory claims. More specifically, although Leath acknowledges that future or continued employment can serve as the consideration to support "most unilaterally imposed policies,"

he asserts that Congress and this Court could not have intended for this consideration to support an arbitration agreement. Leath's argument misconstrues Supreme Court precedent which has held that statutory claims are arbitrable and that courts should apply general contract principles to these agreements. *Id.* By asking the Court to now rule that continued employment is insufficient consideration for an arbitration agreement, Leath asks the Court to depart from *Gilmer* and its progeny and create a new body of contract law specific to arbitration agreements. Because Leath has not presented any compelling reasons why the Court should reconsider *Gilmer*, the Court should deny the Petition.

II.

AN ARBITRATION AGREEMENT WHICH ENCOMPASSES STATUTORY CLAIMS DOES NOT CONSTITUTE A WAIVER OF SUBSTANTIVE RIGHTS.

Leath justifies his argument that arbitration agreements which encompass statutory claims need more consideration than other employment contracts by implying that arbitration of these claims constitutes a waiver of substantive rights protected by those statutes:

> Leath would contend that an employer can not unilaterally impose an arbitration agreement covering the employee's statutory rights as a condition of employment because it would be illegal retaliation under Title VII, and the like for it to terminate an employee who refused to agree to arbitrate his statutory rights as a condition to his employment. The right to seek relief for the violation of a statutory employment claim through the judicial system should itself be considered a protected activity under Title VII, and the like.

(Pet. at 8).[3] Leath's argument falls in the treads of well settled principles governing arbitration agreements. In *Gilmer*, the Court considered an employee's attack on a virtually identical arbitration agreement to the one at issue in this case. *Id.* at 23. Like the arbitration agreement which Leath signed, Gilmer signed an agreement encompassing any controversy "arising out of the employment or termination of employment" of the employee. *Id.* The district court found, as Leath asks the Court to find, that Congress did not intend for ADEA claimants to waive their right to a judicial forum. *Id.* at 24. In holding that the district court applied the wrong analysis, the Court emphasized that public policy strongly favors arbitration. *Id.* at 25; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 at 22 n.7 and 24 (1983). In fact, the Court cautioned that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26; *see also Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Court then explained its disagreement with Gilmer's argument, remarking that:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26; *see also Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996). This passage reflects the "futility" of Leath's argument. *Kelly v. UHC Management Co.*, 967 F. Supp. 1240, 1257 (N.D. Ala. 1997). Leath is not, as he implies, giving up any substantive rights under Title VII or Section 1981. Leath's attack "rest[s] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and consequently is "far out of step

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3. References to the Petition are abbreviated "Pet. __."

with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Gilmer*, 500 U.S. at 30.

Although arbitration of Leath's statutory claims does not by itself warrant any different analysis of the statute, Leath can avoid arbitration of his claims if he carries his burden to show that Congress "evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26; *see also Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991). Leath has not pointed to any section in either Title VII or Section 1981 which evidences this kind of intent and, therefore, has not satisfied his burden. In fact, Title VII and Section 1981 evidence Congressional favor towards arbitration agreements. The Civil Rights Act of 1991, amending both Title VII and Section 1981, states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provision of federal law amended by this title.

Pub. L. 102-166, § 118; *see also Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997). As the Fourth Circuit observed, "[t]he meaning of this language is plain — Congress is in favor of arbitration." *Austin*, 78 F.3d at 881. The conclusion that Title VII and Section 1981 do not evidence a Congressional intent to preclude waiver of arbitration is further supported by the myriad of cases reaching this conclusion. The courts from virtually every Circuit have consistently found that nothing in Title VII demonstrates a Congressional intent to preclude arbitration and, therefore, based on *Gilmer*, these courts have enforced anticipatory agreements to arbitrate. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838 (8th Cir. 1997);[4]

4. *Patterson* actually upheld the enforceability of the exact same arbitration agreement which Leath signed.

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482-83 (D.C. Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992) (per curiam); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (9th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Herko v. Metropolitan Life Ins.* Co., 978 F. Supp. 141, 147 (W.D.N.Y. 1997).

Leath's own analogy to types of employment agreements which would affect an employee's substantive rights reveals the inaccuracy of his analysis. Leath compares an arbitration agreement to an agreement that an employee work for less than minimum wage, work under unsafe conditions or submit to discriminatory practices. (Pet. at 8). AMI agrees that an employer would violate the law by entering into an agreement with its employees concerning these three conditions of employment, irrespective of whether the employer specifically made the agreement a condition of continued employment. The difference between these examples and an arbitration agreement, however, is patently obvious. Forcing an employee to work for less than minimum wage violates the Fair Labor Standards Act. Placing an employee in an unsafe working environment violates the Occupational Safety and Health Act. Requiring that an employee submit to discriminatory practices violates Title VII. Thus, Leath is correct that an agreement in which an employee purported to give up his substantive rights under these statutes would violate the law and be unenforceable. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997). Leath is incorrect, however, in asserting that these agreements are analogous to an arbitration agreement which, as the Supreme Court in *Gilmer* made clear, does not affect the substantive rights of the employee. 500 U.S. at 26. In fact, contracts to arbitrate are

encouraged and further the goals of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Consequently, the district court and Fifth Circuit applied the correct analysis in determining that the arbitration agreement between Leath and AMI is enforceable and Leath has not presented any arguments which justify the Court's granting the Petition to reconsider this analysis. The Petition should be denied.

III.

ANALYZED UNDER WELL ESTABLISHED CONTRACT PRINCIPLES, THE AGREEMENT BETWEEN LEATH AND AMI IS SUPPORTED BY CONSIDERATION.

Based on the incorrect presumption that arbitration agreements affect an employee's substantive rights, Leath argues that these agreements must be analyzed differently than other contracts. Thus, although Leath "concedes" that future employment or continued employment would constitute sufficient consideration for other employment agreements, he asserts that it is insufficient to support an arbitration agreement. (Pet. at 7). Leath's concession shatters his argument. The Federal Arbitration Act intends for courts "to place arbitration agreements on the same footing as other contracts." *Gilmer*, 500 U.S. at 33. Thus, the courts must analyze the enforceability of the arbitration agreement between Leath and AMI under general contract principles. In other words, the fact that the agreement involves arbitration should in no way alter or impact the court's application of Texas contract law. Considering the agreement under this appropriate analytical framework, Leath's admission that, under Texas law, employment contracts can be supported by continued employment confirms that the district court and Fifth Circuit correctly applied the law. *See, e.g., Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986); *Gamble v. Gregg County*, 932 S.W.2d 253, 256 (Tex. App.—Texarkana

1996, no writ); *Adams v. Valley Fed. Credit Union*, 848 S.W.2d 182, 189 (Tex. App.—Corpus Christi 1992, writ denied); *Jennings v. Minco Tech. Labs, Inc.*, 765 S.W.2d 497, 499 (Tex. App.—Austin 1989, writ denied); *Texas Employment Comm'n v. Hughes Drilling Fluids*, 746 S.W.2d 796, 799-800, n.5 (Tex. App.—Tyler 1988, writ denied).[5] In fact, at least two Texas courts have specifically found that continued employment is sufficient consideration to support an arbitration agreement. *Circuit City Stores, Inc. v. Curry*, 946 S.W.2d 486, 488 (Tex. App.—Fort Worth 1997, orig. proceeding); *Burlington N. R.R. v. Akpan*, 943 S.W.2d 48, 52 (Tex. App.—Fort Worth 1996, no writ). Perhaps a different issue might exist if Texas' acceptance of future or continued employment as consideration for agreements constituted a departure from general contract principles accepted in other forums. However, as Leath admits, federal courts outside of Texas have construed other states' contract laws to likewise allow future or continued employment to serve as the consideration for an agreement to arbitrate. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 229-30 (3rd Cir.), *cert. denied*, 118 S. Ct. 299 (1997); *Cole v. Burns Int'l Sec. Servs*, 105 F.3d 1465, 1482 (D.C. Cir. 1997); *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997); *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993). (Pet. at 7). Because the district court and Fifth Circuit applied these well settled contract principles, this Court should deny the Petition.

Leath attempts to escape the application of these principles by arguing that an arbitration agreement between an employer and

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5. In *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997), the court considered and found that the exact same agreement which Leath signed was supported by adequate consideration in the form of the parties' mutual agreement to arbitrate. Accordingly, in addition to Leath's continued employment, the arbitration agreement between the parties is supported by AMI's own agreement to submit to arbitration of disputes.

employee by its very nature is not "voluntary" because the parties have unequal bargaining power. (Pet. at 12). Again, Leath's position contradicts the established law. The courts have consistently found that an arbitration agreement between an employer and employee is not unenforceable merely because the parties have unequal bargaining power. *Gilmer*, 500 U.S. at 33; *Great W. Mortgage Corp.*, 110 F.3d at 229; *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447, 1456 (D. Minn. 1996); *Lang v. Burlington N. R.R. Co.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993); *Hampton v. ITT Corp.*, 829 F. Supp. 202, 204 (S.D. Tex. 1993). AMI does not dispute that, in some circumstances, an agreement could "result [ ] from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer,* 500 U.S. at 25. However, Leath does not allege any facts which would place his agreement with AMI in this different analytical setting. *Kelly v. UHC Management Co.*, 967 F. Supp. 1240, 1258 (N.D. Ala. 1997). Leath does not allege that he was coerced, misled or pressured into signing the arbitration agreement. *Ludwig v. Equitable Life Assurance Soc'y*, 978 F. Supp. 1379, 1381 (D. Kan. 1997). He does not even allege that he did not read the agreement or that he was not given time to read the agreement. *Kelly*, 967 F. Supp. at 1258. The arbitration agreement specifically stated that it was conditioned upon employment or continued employment and Leath signed that agreement. (R. at 21). Because Leath has presented no facts which distinguish this case from *Gilmer* or justify a departure from that opinion, this Court should deny the Petition.

Narrowed down to its central theme, the Petition reflects a general distrust of arbitration agreements. Congress enacted the Federal Arbitration Act for the purpose of eradicating the type of distrust of arbitration that Leath asks the Court to apply. *Allied-Bruce Terminex Co., Inc. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford*

Junior Univ., 489 U.S. 468, 474 (1989). Furthermore, *Gilmer* necessarily rejected the types of broad public policy arguments against arbitration which Leath re-presents to the Court. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Alford v. Dean Witter Reynold, Inc.*, 939 F.2d 229, 230. The Court has previously considered the arguments presented in the Petition and the courts, including the district court and Fifth Circuit in this case, have appropriately applied the law. The Petition should be denied.

CONCLUSION

The Petition presents an attempt to reargue *Gilmer*. Because the Petition is devoid of any reasons justifying reconsideration of this case or the principles articulated therein, the Petition should be denied.

Respectfully submitted,

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